J. Frank Staley
v a McCloskey

266

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923. [redacted] 1924

No. [redacted]42

JAMES SHEWAN & SONS, INC., APPELLANT,

*vs.*

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 14, 1923.

"to employee

(29,547)

Suit in admiralty Act

291 F 713

What is the meaning of the phrase "is employed" in Section 2 Part 2 of Admiralty Act? Why should the fact that the vessel is laid up at the moment of the tort be controlling? It is the character

# (29,547)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 21, 1923.

1 **UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.**

JAMES SHEWAN & SONS, INC., Libelant,

against

UNITED STATES OF AMERICA, Respondent.

**Certificate of Jurisdictional Question.**

SOUTHERN DISTRICT OF NEW YORK, ss:

I hereby certify that the above entitled cause is one in which the jurisdiction of the court is in issue, and that the decree dismissing the libel herein upon exception thereto is based solely on the ground that, the action being brought in admiralty, the libel does not set forth a cause of admiralty and maritime jurisdiction and that, treating the exceptions and the exceptive allegation of the United States of America as presenting the question of jurisdiction within the Suits in Admiralty Act of March 9, 1920, Chapter 95, 41 Statutes at Large 525, and no other question, the court, without having occasion to consider the merits, has adjudged that the District Court of the United States has no jurisdiction herein.

This certificate is made conformably to Section 238 of the Judicial Code to be sent up as part of the proceedings.

Dated this 26th day of March, 1923. Augustus N. Hand, United States District Judge for the Southern District of New York.

2 **Libel.**

To the Honorable the Judges of the United States District Court for the Southern District of New York.

The Libel and Complaint of James Shewan & Sons, Inc., against The United States of America in a cause of contract, civil and maritime, respectfully shows:

First. That your libelant now is and at all of the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Second. That the steamer "Biran" is owned by the United States of America and at all the times herein mentioned was engaged in mercantile trade.

Third. That heretofore and during the month of May, 1920, libelant at the special instance and request of the master, owner, agent or person in charge of the steamer "Biran", performed certain work, labor and services for said steamship, all of the fair and

reasonable value of Nine hundred three and 03 100 ($903.03) Dollars; that all of the said materials and supplies were fit, proper and necessary for said vessel and were furnished upon the credit of said vessel.

Fourth. That although libelant has duly demanded payment of the aforesaid sum, the same has not been paid, nor has any part thereof been paid, and the same by the maritime law and the Statutes of the United States of America and the laws of the State of New York became and now is a lien upon said vessel, her engines, boilers, tackle, apparel and furniture.

Fifth. That said vessel "Biran", her engines, boilers, tackle, apparel and furniture, is now within the jurisdiction of the United States and of this Honorable Court.

Sixth. That the United States of America has agents or officers residing and having a place of business within the jurisdiction of this Court, and has property therein.

Seventh. That the foregoing lien is such as could ordinarily be enforced in admiralty by proceeding in rem against the vessel "Biran".

Eighth. That under and by virtue of certain Statutes of the United States, approved by the President of the United States, it is provided that in matters of claim such as the foregoing, suit may be brought in admiralty against the United States in the jurisdiction where the libelant resided or had its principal place of business and this action is brought under the provisions of said Statutes.

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays that citation in due form of law may issue against the respondent herein, citing it to appear and answer all and singular the matters aforesaid, and that libelant may have judgment for the amount of its claim aforesaid, with interest and costs, and have such other and further relief in the premises as to the Court may seem just. Foley & Martin, Proctors for Libelant, 61 Wall Street, New York City.

STATE OF NEW YORK,
*County of New York, ss:*

James A. Martin, being duly sworn, deposes and says, that he is a member of the firm of Foley & Martin, Proctors for the Libelant herein; that he has read the foregoing Libel and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent is that libelant is not within the jurisdiction of this Court.

That the sources of deponent's information and the grounds of his belief as to all matters not stated in the Libel to be alleged upon

his own knowledge, are reports made to him by employees, together with records of said corporation. J. A. Martin.

Sworn to before this 12th day of May, 1922. Eva Gilmartin, Notary Public, New York County No. 117, Reg. No. 3229. Certificate Filed in Bronx County No. 15, Reg. No. 46. Kings County Clerk's No. 25, Reg. No. 3111. Queens County Clerk's No. 280, Commission Expires March 30, 1923.

6 District Court of the United States, Southern District of New York.

[Title omitted.]

## Exceptions to Libel.

The respondent, United States of America, by its proctor, William Hayward, United States Attorney for the Southern District of New York, appearing herein specially for the sole purpose of objecting to the jurisdiction of this Court, and not otherwise, excepts to the libel of James Shewan & Sons, Inc., in a cause of contract, civil and maritime, upon the following grounds:

First. In that it is not alleged that at the date of the filing of the original libel herein, the steamship "Biran" was employed as a merchant vessel.

### Exceptive Allegations.

Second. That on the 11th day of June, 1921, the steamship "Biran" was withdrawn from merchant service and laid up in the Hudson River at Cornwall, in the State of New York, and that ever since said last mentioned date said steamship has been and still is withdrawn from merchant or any other service and will continue to be so withdrawn from such service, and that since said 11th day of June, 1921, said steamship "Biran" has not been used, operated or employed as a merchant vessel, and that at the time of the filing of the libel herein, the said steamship "Biran" was not used, operated or employed as a merchant vessel by this respondent,
7 or by any other person, firm or corporation in its behalf or otherwise; that since said 11th day of June, 1921, said steamship "Biran" has carried no crew nor cargo, and since said date has been, now is and will for an indefinite period continue to be laid up and withdrawn from merchant or other service, and that during all of said time said steamship "Biran" has been, now is and will continue to be laid up in the Hudson River as aforesaid in the care of respondent's care takers with the out of use and laid up fleet of the respondents, at the place aforesaid, and said vessel has not been since said date the subject of any operating agreement for use in the merchant service nor is it contemplated to use said vessel

in the merchant service by this respondent or any other person, firm or corporation.

Wherefore, respondent prays that the libel may be discontinued. William Hayward, United States Attorney for the Southern District of New York, Proctor for Respondent. Appearing specially and not otherwise. Office & Post Office Address: Room 700, 15 Broadway, Borough of Manhattan, City of New York.

8 At a Stated Term of the District Court of the United States of America for the Southern District of New York held at the court rooms thereof, in the Post Office building, Park Row, Borough of Manhattan, City and State of New York, on the 26 day of March, 1923.

Present: Honorable A. N. Hand, District Judge.

[Title omitted.]

**Order Dismissing Libel for Want of Jurisdiction.**

This matter having come on to be heard on the libel and the exceptions and exceptive allegations filed thereto, the libellant being represented by Foley & Martin, its proctors, George V. A. McCloskey, advocate, and the respondent by its proctor William Hayward, United States Attorney for the Southern District of New York, by Walter Schaffner, Special Assistant United States Attorney, it is

Ordered that the said libel be deemed amended so that article Second thereof shall read as follows:

"Second. That the steamship "Biran" is owned by the United States of America, and at all times hereinafter mentioned was employed as a merchant vessel."

and it is further

Ordered that the exception and exceptive allegation filed against said libel be deemed filed against, and stand as to said libel as now amended.

And thereupon said exception and exceptive allegation having been duly argued by the respective counsel, and counsel for
9 the libellant having admitted in open court that on the 11th day of June, 1921, the steamship "Biran" was laid up in the care and custody of caretakers employed by the United States Shipping Board, in the out of use and laid-up fleet of the United States Shipping Board anchored in the Hudson River near Cornwall, New York, within the Southern District of New York, and so remained at and ever since the time when the libel was filed herein, and that ever since said 11th day of June, 1921, the said steamship "Biran" has carried neither crew nor cargo, nor been the subject of any op-

erating agreement for use in the merchant or other service, nor been transferred by the United States Shipping Board to any other department or agency of the Government of the United States, thereupon it is

Ordered that the exception and exceptive allegation filed to the said libel as amended be and the same hereby are sustained. And it is further

Ordered, adjudged and decreed that the said amended libel be and the same hereby is dismissed solely for want of jurisdiction. Augustus N. Hand, U. S. D. J.

Notice of settlement waived. Foley & Martin, Proctors for Libelants. William Hayward, Proctor for Respondent.

10 United States District Court for the Southern District of New York.

[Title omitted.]

## Assignments of Error.

The libelant above named prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:

1. That the court erred in holding that it was without jurisdiction in admiralty of the cause of action alleged in the libel.

2. That the court erred in holding that it was without jurisdiction in admiralty over the respondent under the Suits in Admiralty Act of March 9, 1920.

3. That the court erred in holding that it did not have jurisdiction in admiralty in the cause for as much as the steamship "Biran" was laid up at the time the libel was filed herein.

4. That the court erred in holding that it was without jurisdiction in admiralty of the cause because of the matters of fact recited in the decree.

5. That the court erred in holding that it was without jurisdiction in admiralty of the cause by reason of the exceptive allegation of the respondent.

6. That the court erred in sustaining the exception to the libel.

11 7. That the court erred in holding that the exceptive allegation set forth facts rendering the Suits in Admiralty Act of March 9, 1920, inapplicable to the cause of action set forth in the libel.

8. That the court erred in holding that the respondent had not given its consent to be sued in this cause.

9. That the court erred in dismissing the libel. Foley & Martin, Proctors for Libelant.

12 United States District Court, Southern District of New York.

[Title omitted.]

## Petition for and Order Allowing Appeal.

The above named libelant, conceiving itself aggrieved by the decree made and entered herein on the — day of March, 1923, hereby appeals from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 26th day of March, 1923. Foley & Martin, Proctors for Libelant.

The foregoing claim of appeal is hereby allowed. Augustus N. Hand, United States District Judge.

13 **Citation and Service.**

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of New York, filed in the Clerk's Office of said Court on the 26th day of March, A. D. 1923, in a cause wherein James Shewan & Sons, Inc., is appellant and you, appellee, to show cause, if any, why the decree rendered against said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 26th day of March, A. D. 1923. Augustus N. Hand, Judge of the District Court of the United States for the Southern District of New York.

Service of a copy of the foregoing citation is hereby admitted this 26th day of March, 1923. William Hayward, United States Attorney, Proctor for Respondent.

11 United States District Court for the Southern District of New York.

[Title omitted.]

**Stipulation as to Record.**

It is hereby stipulated and agreed that the foregoing papers are all the papers necessary to be presented to the court on the appeal herein, to-wit:

1. Certificate of jurisdictional question.
2. Libel.
3. Exception and exceptive allegation of the United States of America.
4. Final decree.
5. Assignments of error.
6. Petition for leave to appeal and order allowing appeal.
7. Citation.

And it is further stipulated and agreed that the foregoing are true copies of the said papers in the above entitled matter as agreed upon by the parties.

Dated March 30, 1923. Foley & Martin, Proctors for Libelant. William Hayward, United States Attorney, Proctor for Respondent.

15 United States District Court for the Southern District of New York.

[Title omitted.]

**Clerk's Certificate.**

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof I have caused the Seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York, the 31st day of March, 1923, in the year of our Lord One thousand nine hundred and twenty three and of the Independence of the United States the One hundred and forty seventh. Alex. Gilchrist, Jr., Clerk. [Seal of the District Court of the United States, Southern District of New York.]

Endorsed on cover: File No. 29,547. S. New York, D. C. U. S. Term no. 997. James Shewan & Sons, Inc., appellant, vs. The United States of America. Filed April 11th, 1923. File No. 29,547.